

**THE ADR REVOLUTION:
PARTNERING THE DISPUTES PROCESS**

DLA's Defense Energy Support Center
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WHAT IS ALTERNATIVE DISPUTE RESOLUTION (ADR)?

Definition: Any procedure agreed to by the parties to resolve disputes using a *third party neutral*.

Types: Mediation, facilitation, arbitration, conciliation, fact-finding, use of ombuds, early neutral evaluation, mini-trials, or any combination.

WHY DO ADR?

It makes sense (saves time, money, resources; builds better relationships)

It supports DLA strategic goals

- #1: Supporting our Customers
- #2: the Revolution in Business Affairs
- #3: Enabling our Workforce
- #5: Partnering with Industry

It's DLA policy

--DLAD 5145.1: Encourages the expanded use of ADR. If unassisted negotiations do not resolve an "issue in controversy," ADR *must* be considered and a decision not to use ADR must be explained in writing by an official at least one level above the deciding official, after consultation with counsel.

--Director, DLA letter (Feb. 11, 1999); Commander, DLSC letter (Feb. 26, 1999)

--PROCTR 96-09, "Use of ADR to Resolve Contract Disputes" (Mar. 15, 1996)

--AQ Letter to DCMC Commanders, "Use of ADR to Resolve Contract Disputes" (Apr. 5, 1996)

It's authorized/supported by the FAR

- FAR 33.103(c)
- FAR 33.201, 33.204, 33.210, 33.214

--FAR 52.233-1 (if a party rejects offer of ADR, must explain why in writing)

It's Administration policy

--Presidential Memorandum: Committee to Facilitate and Encourage ADR,
May 1, 1998

--DOJ Policy Statement on the Use of ADR, 61 Fed. Reg. 4729 (1996)

--DOD Directive 5145.5 (implementing ADRA) (April 22, 1996)

It's the law

--Administrative Dispute Resolution Act (ADRA) of 1996 (amending 1990 law),
Pub.L. 104-320. Agencies must have an ADR specialist; for DLA it is the
General Counsel. PLFA legal offices all have ADR specialists.

--Executive Order 12988 (2/9/96), Civil Justice Reform, to reduce Government
litigation; use informal dispute resolution/ADR.

There are exceptions (e.g., precedent-setting issues, significant policy matters,
need for a public record)

THE ADR MINDSET

ADR is always a "win." Often the concern is to "win" the case, or explain why
what we did is "right." But does "winning" mean? Getting what you want. ADR
helps focus on *what both parties want*. ADR is also valuable even if parties can't
resolve disagreement (focus/narrow issues; improve relationships).

ADR is "interest based." Traditional dispute resolution is on the *position* or the
issue. ADR is about *interests*. Is it in our interest to keep insisting we are legally
right (even if we are) if we alienate a contractor and spend lots of money
answering letters, complaints to OSD/Congress/the Director?

WHAT IS MEDIATION?

Definition: Mediation is a process where parties meet with a third party neutral
(the mediator) in a nonadversarial setting to seek resolution of the dispute. The
mediator helps the parties craft their own solutions to the problem. If successful,
mediation results in written agreement resolving the dispute.

Preference for Mediation: DIAD 5145.5 gives special emphasis to mediation in
selecting ADR, because of its particular benefits.

MEDIATION BENEFITS

- Parties retain control of dispute resolution
- Parties have more options than in other forums
- Parties can preserve business relationships/reduce likelihood of further dispute
- Parties typically save money
- Parties can address real issues in dispute
- Parties work directly with each other
- Parties may avoid unfavorable judicial/administrative precedent
- Mediation has good success rates; even if unsuccessful, parties retain existing rights.

WHY CAN'T WE RESOLVE DISPUTES WITHOUT A THIRD PARTY?

Sometimes you can! Go for it!

Trust Problems: company sees DLA as the "opponent;" does not believe DLA's position ("reactive devaluation")

Reality Testing: mediator/neutral can evaluate case; temper unrealistic positions

Problem solving: neutral can help explore options the parties could not identify themselves.

Builds partnerships: provides a forum for better listening and problem-solving; shows company DLA cares enough to give them a hearing with a third party

HOW TO WORK AN ISSUE THROUGH MEDIATION

Approach the party. Phone call. Perhaps follow up letter. Explain mediation (often they are unfamiliar with it). Counsel available to assist.

Agree to mediation. Typically a written agreement. Includes agreement on location, attendees, mediator, any cost issues.

Selecting a Mediator. Trained, experienced mediator. DLA has mediators (pay TDY). Other area mediators are available, sometimes free; if not, fee splitting is typical.

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TOP 10 REASONS NOT TO USE ADR

10. YOU ENJOY AND RELISH THE INPUT OF YOUR TRIAL LAWYERS ON EVERY DECISION (TECHNICAL FINANCIAL, AND MARKETING) IN ORDER TO “PROTECT OUR RIGHTS” DURING A LONG DISPUTE.
9. YOU ENJOY ANSWERING VOLUMINOUS INQUIRIES AND REQUESTS FOR DOCUMENTS FROM THE IG, FBI, DOJ, OSI, CID AND OPPOSING COUNSEL.
8. YOUR AGENCY HAS EXCESS FUNDS AND YOU WOULD LIKE TO BET THEM IN A JURY TRIAL.
7. YOU ACTUALLY BELIEVE THAT A JURY WILL BE MADE UP OF YOUR PEERS.
6. YOU ARE ABSOLUTELY CONFIDENT THAT ALL YOUR MANAGERS AND SUPERVISORS HAVE ACTED PROPERLY AND LEGALLY AND THAT A JURY WILL BELIEVE THEM.
5. YOU ARE AN EXPERT IN ALL LAWS, REGULATIONS, AND CURRENT COURT INTERPRETATIONS, AND ARE WILLING TO BET YOUR JOB THAT YOU WILL WIN IN THE TRIAL AND APPELLATE COURTS
4. YOUR AGENCY WILL BENEFIT FROM THE NEGATIVE PUBLICITY OF A LAWSUIT!
3. YOU WOULD RATHER HAVE A JUDGE OR JURY DECIDE THE OUTCOME RATHER THAN KEEP CONTROL OF THE OUTCOME YOURSELF.
2. YOU WANT TO WAIT FOR 3-5 YEARS FOR A DECISION (SEE NUMBER 10).
1. YOU FEEL SORRY FOR YOUR LAWYERS AND YOU WANT TO CONTINUE TO SUPPORT THEM IN THE STYLE TO WHICH THEY HAVE BECOME ACCUSTOMED!